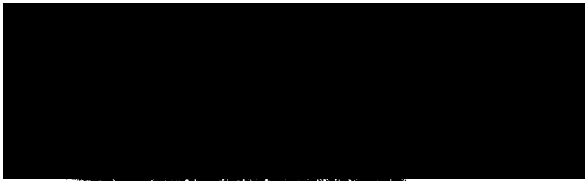




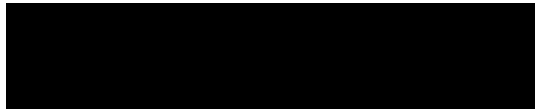
U.S. Citizenship
and Immigration
Services

57



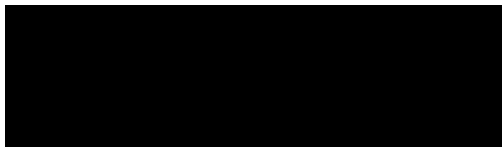
FILE: LIN 03 132 53804 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



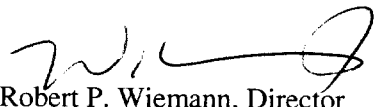
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner began operations as a sole proprietorship in early 2001. The petitioner changed its business classification to a limited liability company in the State of Oregon in March 2003. It imports tea from Indonesia for sale in the United States. It seeks to temporarily employ the beneficiary as its tea production and import manager. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner claims to be affiliated with P.T. Batavia Global Internusa, located in Jakarta, Indonesia.

The director denied the petition concluding that the record did not establish that: (1) a qualifying relationship exists between the petitioner and the foreign entity; (2) within three years preceding the beneficiary's application for admission into the United States, the beneficiary had been employed in a managerial or executive capacity for the foreign entity; or, (3) the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner asserts that the director erred in his conclusions denying the petition.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) further states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The first issue in this proceeding is whether a qualifying relationship exists between the foreign and U.S. entities.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term “qualifying organization” and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien’s stay in the United States as an intracompany transferee; and,
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner has provided [REDACTED] Internal Revenue Service (IRS) Form 1040, U.S. Individual Income Tax Return, Profit or Loss from Business (Sole Proprietorship) Schedule that substantiates that Weliam A. Worotikan owned the petitioning entity as a sole proprietorship in 2001. The petitioner has also supplied evidence that its Articles of Organization as a limited liability company were filed with the Oregon Secretary of State in March 2003. The Articles of Organization show that Weliam Albert Worotikan

and Reba Renee Worotikan are the petitioner's registrants. The petitioner has also provided the following documentation to establish that [REDACTED] own the foreign entity:

1. A translated document titled "Letter of Business Permit Commerce Small Business" filed in March 2001 with the Department of Industry and Commerce in the Republic of Indonesia. The translated document indicates that the "Owner Name/Responsible Party" is [REDACTED]. [REDACTED] sworn statement that avers that: "At all times [REDACTED] and his wife] have directed the business of Batavia International both in the United States and Indonesia;
3. An organizational chart depicting the corporate structure of the two entities;
4. An unsworn statement from the Indonesian General Manager, [REDACTED] (brother), stating that when his brother and sister-in-law wanted to open a "branch office" in Indonesia he acted as the Indonesian branch office's local contact as required by Indonesian law and registered the Indonesian business. [REDACTED] stated further his brother and his sister-in-law owned the Indonesian office; [REDACTED] business plan;
6. An unsworn statement from the United States entity's general manager indicating that the petitioner's business records reflected that [REDACTED] registered the foreign entity on behalf of his brother, [REDACTED];
7. Correspondence showing [REDACTED] involvement in the foreign entity's operations.

The director had the above documentation before him, except for the United States entity's general manager's statement, the correspondence showing [REDACTED] involvement in the foreign entity, and [REDACTED] sworn statement. The director determined that the submitted documentation was not substantive evidence demonstrating the claimed ownership. The director specifically observed that the registration document for the foreign business indicated [REDACTED] as the foreign entity's owner/responsible party and that the petitioner was claiming that a local registrant was necessary in order to comply with Indonesian law. The director concluded that the petitioner had not established that a qualifying relationship existed between the petitioner and the foreign entity.

On appeal, counsel provides [REDACTED] sworn statement, correspondence showing [REDACTED] involvement in the foreign entity, and the unsworn statement of the United States entity's general manager. Counsel asserts that the registration document shows that a company could be registered by either an owner or representative and that the company's own word, now accompanied by [REDACTED] sworn statement, substantiates the business relationship between the two entities.

Counsel's assertion is not persuasive. First, the record does not clearly set forth the nature of the relationship between the United States entity and the foreign entity. It is not clear whether the petitioner claims that the foreign entity is a branch office, that is, an operating division or office of the petitioner housed in a different location or is a separate legal entity that is affiliated with the United States entity through common ownership and control.

Second, the petitioner has not provided translated versions of pertinent Indonesian law requiring that a business, whether incorporated, a partnership, limited liability company, branch office, or sole proprietorship,

be registered using a local registrant.¹ In addition, the petitioner has not submitted evidence showing that the use of a local registrant, when someone other than the local registrant purportedly owns the entity, is a subterfuge allowed by Indonesian law. Further, the record does not contain agreements or other legally binding documentation establishing the ownership/membership roles of [REDACTED] in the foreign entity.

Third, the petitioner has not provided documentary evidence that [REDACTED] has capitalized the foreign entity with his funds or the United States entity's funds to support the claimed ownership of the foreign entity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Without full disclosure of the above information, Citizenship and Immigration Services (CIS) is unable to determine the legality and the elements of ownership and control for the foreign entity. The lack of clarity on the foreign entity's registration document raises significant questions regarding the nature and ownership of the foreign business and the questions have not been resolved on appeal. The AAO acknowledges that [REDACTED] sworn statement is probative evidence; however, the lack of information regarding Indonesian law on registering a business purportedly owned by non-local individuals or by a United States entity undermines the sworn statement. The record does not contain sufficient evidence to overcome the director's decision on this issue.

The second issue in this proceeding is whether the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

¹ The AAO is unfamiliar with Indonesian law and questions whether the local registrant is used primarily as a service agent or whether a local registrant is the individual or company that owns and is otherwise responsible for the actions of the business.

- iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a March 18, 2003 letter submitted with the petition, the petitioner explained that the beneficiary's position abroad as assistant general manager included "managing and overseeing the production of the product of Batavia black and green teas, coordinating the production of the tea, overseeing all specs [sic] and quality control issues, directing the packaging, printing, shipping and compliance with Indonesian export laws." The petitioner also provided the foreign entity's organizational chart showing a general manager, the beneficiary's position of assistant general manager, a sales director, and an office assistant.

On March 21, 2003, the director requested a statement from the petitioner including information concerning the dates of the beneficiary's employment abroad, job titles, specific job duties, types of employees supervised, if any, the beneficiary's level of authority, and title and level of authority of the alien's immediate supervision. The director also requested the percentage of time the beneficiary spent performing her various duties.

In response, the petitioner stated the beneficiary had set up the entire network necessary to direct the production of tea from grower to shipper. The petitioner also listed the beneficiary's more specific duties as:

- | | |
|------------|---|
| 20 percent | Research and interview tea plantation operations as potential growers. |
| 40 percent | Negotiate and execute contracts on behalf of company and maintain contact and communication to supervise quality control with the following: |
| | <ul style="list-style-type: none">• Tea plantations• Factory that processes and packages tea• Design/packaging production |

- 10-15 percent Oversee development of key image and logo design elements. On-going supervision of relationship with designer to coordinate image with advertising, packaging, communications, package, website.
- 30 percent Negotiations and regulatory compliance with Indonesia export obligations. Contract with and maintain relationship with shippers and freight forwarders.

The director determined that the record did not establish that the beneficiary managed a subordinate staff of professional, managerial, or supervisory personnel who relieved her from performing the services of the business; but rather the record demonstrated that the beneficiary had been involved in the ordinary duties necessary to maintain the business.

On appeal, counsel for the petitioner asserts that the beneficiary has been a functional manager, who was responsible for the management of a number of functions that are essential to the business. Counsel references the beneficiary's duties described in the response to the director's request for evidence and contends that the duties described are primarily managerial. Counsel also asserts that, even though this petition is not for a "new office," the reasoning allowing a manager to be a functional manager as a business plan unfolds and growth follows should be considered.

Counsel's assertions are not persuasive. The description of the beneficiary's duties shows that the beneficiary is the individual who spends the majority of her time researching the market to locate growers, negotiating contracts to include quality controls, contracting with shippers and freight forwarders, and coordinating with a designer on advertising, packaging, and the website. These duties are more indicative of an individual who is performing various services to set up and maintain the operations of the company abroad. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Counsel's assertion that these duties are primarily managerial is not sufficient. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel's assertion that the beneficiary has been a functional manager is also not persuasive. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. In this matter, counsel seems to contend that all the beneficiary's tasks are essential to setting up the new business. However, to allow all individuals who perform the routine and necessary work of a business to

be elevated to the position of a functional manager would render the term meaningless. Moreover, as observed above, the petitioner's description of the beneficiary's duties is indicative of an individual performing the everyday operational tasks of the business and an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *See Matter of Church Scientology International*, 19 I&N Dec. at 604. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Counsel's assertion that the reasoning behind the regulations for a new office should be applicable in this matter is not persuasive. The regulations define a "new office" as "an organization which has been doing in the United States through a parent, branch, affiliate, or subsidiary for less than one year." As counsel acknowledges, the petitioner has been in existence and operating for over two years. Further the petitioner did not specifically request a visa classification pursuant to the "new office" regulations. Therefore, the regulations applicable to a "new office" petition are not applicable to this proceeding. *See* 8 C.F.R. § 214.2(l)(1)(ii)(F). Further, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The petitioner has not submitted sufficient evidence that the beneficiary's position with the foreign entity comprised primarily managerial or executive duties.

The remaining issue in this proceeding is whether the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

In a letter appended to the petition, the petitioner explained that as assistant general manager² of the U.S. entity, the beneficiary would be a key player in the development of the distribution network in the United States. The petitioner added that: "[the beneficiary] will liaise with our contacts at key potential customers and manage the receipt and distribution of the tea here in the United States." The petitioner explained that the beneficiary would keep many of her duties abroad and would travel between the United States and Indonesia; but needed to be physically in the United States to set up the distribution network here.

The director requested a statement from the petitioner describing the beneficiary's intended employment including information concerning the dates of the beneficiary's employment, job titles, specific job duties, types of employees supervised, if any, the beneficiary's level of authority, and title and level of authority of the alien's immediate supervision. The director also requested the percentage of time the beneficiary spent performing her various duties.

In response, the petitioner stated that the beneficiary would be responsible for the receipt of the shipped materials and moving them through market. The petitioner indicated that the beneficiary would be responsible "to contract with warehouses, transportation vendors, distributor organizations and ultimate customers to develop a distribution network and take our product to market." The petitioner also listed the elements encompassed in the beneficiary's proposed position:

² The petitioner identified the beneficiary's position on the Form I-129, Petition for a Nonimmigrant Worker as the tea production and import manager.

5 percent	Coordinate compliance with US import regulations
5 percent	Negotiate and contract with shipment receivers/dock handlers/warehouse
10 percent	Develop markets for Batavia Teas: <ul style="list-style-type: none"> • Contract, negotiate and contract with key commercial buyers • Supervise the coordination of product delivery to customer site
30 percent	Development and oversee network of distribution, regionally and nationally as contemplated in Batavia International, LLC Business Plan
10 percent	Responsible for hiring and supervising personnel as needed as business grows in order to bring contracted functions to in-house roles
30 percent	Continue managerial role of overseeing tea production to shipping in Indonesia
10 percent	Prepare sales projections, regular budgets and create forecasts for needed tea production to meet sales projection

The director determined that the record did not establish that the beneficiary managed a subordinate staff of professional, managerial, or supervisory personnel who relieved her from performing the services of the business; but rather the record demonstrated that the beneficiary had been involved in the ordinary duties necessary to maintain the business.

On appeal, counsel submitted the same arguments regarding the beneficiary's managerial capacity for the United States entity as had been submitted in regard to the beneficiary's foreign position.

Counsel's assertions, again, are not persuasive. The petitioner's description of the beneficiary's duties demonstrates that the beneficiary will spend the majority of her time on market analysis, marketing the petitioner's product, and creating a distribution network. The beneficiary's duties are not sufficiently detailed to conclude that the beneficiary is managing these functions, rather than performing all the tasks necessary to carry out the functions. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. See *Matter of Church Scientology International*, 19 I&N Dec. at 604.

Based on the evidence presented, the AAO cannot conclude that the beneficiary would be employed in the U.S. entity in a primarily managerial or executive capacity.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.